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No. 02-1464

IN THE
Supreme Court of the United States

GEORGE E. SNYDER, Warden, *Petitioner,*

v.

MARIO ROSALES-GARCIA, *Respondent.*

RANDY J. DAVIS, Warden, and BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, *Petitioners,*

v.

REYNERO ARTEAGA CARBALLO, *Respondent.*

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, U.S. REPS. ELTON GALLEGLY and LAMAR SMITH, and FRIENDS OF IMMIGRATION LAW ENFORCEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1231(a)(6) requires the release into American society of an inadmissible alien apprehended at the border of the United States if, after a six-month period of detention, the evidence suggests that there is no significant likelihood that the alien can be returned to his native country in the reasonably foreseeable future -- even when the government has determined that the alien presents a danger to public safety.

2. Whether continued detention of an inadmissible alien apprehended at the border of the United States under the scenario described above violates the alien's due process rights under the Fifth Amendment.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Demore v. Kim,* 123 S. Ct. 1708 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Honorable Elton Gallegly and the Honorable Lamar Smith are United States Representatives from California and Texas, respectively. They believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by detaining, pending removal, those inadmissible aliens who pose a threat to public safety.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Friends of Immigration Law Enforcement (FILE) is an association of attorneys, researchers, law enforcement officers, legislators, and other experts working on behalf of Americans to ensure that immigration law is being enforced. FILE assists in filing lawsuits and complaints and helps Americans who have been harmed by our government's failure to enforce immigration law.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to detain inadmissible aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, as a result of decisions from the Sixth and Ninth Circuits, scores of criminal aliens at this moment are walking freely on the nation's streets, despite having been convicted of serious felonies, despite being subject to final orders of exclusion/inadmissibility, despite never having been admitted into the country, and despite repeated INS/ICE determinations that they pose a danger to the community. *Amici* are filing an *amicus curiae* brief in this case because they fear for the public safety if the Sixth Circuit's decision is allowed to stand.

Amici are also concerned by the national security and foreign policy implications of the decision below. The Sixth Circuit has essentially held that the federal government is

powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. By depriving the government of the option of detaining such individuals until the foreign country agrees to take them back, the Sixth Circuit has left a large "'unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement contained in the Petition.

In brief, Respondents are among 125,000 Cubans who attempted to enter the United States illegally during the 1980 Mariel boatlift. A considerable number of those Cubans (including Respondent Carballo) had extensive criminal records while in Cuba: Cuban leader Fidel Castro released numerous individuals from Cuban prisons and mental institutions and included them among those fleeing the Castro dictatorship by boat from the port of Mariel, Cuba. The Mariel Cubans were intercepted along the coast of Florida and were excluded from the United States. However, Castro refused to permit the Mariel Cubans to return home. As a result, the vast majority of the Mariel Cubans (including Respondents Rosales-Garcia and Carballo) were temporarily paroled into this country, pursuant to 8 U.S.C. § 1182(d)(5), until such time as their return to Cuba could be arranged. To date, less than 2,000 have been repatriated.

While free on parole, Rosales-Garcia and Carballo wasted no time accumulating extensive criminal records. Between 1981 and 1984, Rosales-Garcia was convicted of criminal offenses on four separate occasions; his offenses included grand theft, drug possession, resisting arrest, burglary, grand larceny, and escaping from prison. He was imprisoned for those crimes from 1983 to 1986, and for two years thereafter he remained in Immigration and Naturalization Service (INS) custody. Pet. App. 5a-6a. He was released on immigration parole for a second time in May 1988. In March 1993, he was convicted of conspiring to possess cocaine with intent to distribute and was sentenced to 63 months in federal prison. *Id.* 6a. Upon completion of that sentence in May 1997, he was returned to INS custody. He has been at liberty in the United States since being released on parole for a third time in May 2001. At no time has Rosales-Garcia been admitted into the United States; indeed, an Immigration Judge determined in June 1987 that Rosales-Garcia was excludable and ordered his removal from the country.

By April 1983, Carballo had been arrested 16 times for criminal offenses. In that month, he was convicted of attempted first-degree murder, aggravated assault with a deadly weapon, and robbery; he was given eight-year concurrent sentences for those crimes. Carballo remained in prison from 1983 to 1988, and in INS custody from 1988 to 2002. *Id.* 8a. While in INS custody, he "developed a sizable disciplinary record." *Id.* 146a. In September 1994, an Immigration Judge ordered Carballo excluded from the country. He was placed in a nine-month substance abuse program in December 2002 and, if he successfully completes the program, is scheduled to be paroled a second time in September 2003. *Id.* 6a.

Proceedings Below. In July 1998, Rosales-Garcia filed a habeas corpus petition pursuant to 28 U.S.C. § 2241 in federal district court. He contended that the INS's revocation of his parole in 1997 and his continued detention violated the Fifth Amendment's Due Process Clause, in the absence of evidence that Cuba would allow his return in the near future. The district court denied the petition, ruling that the INS gave Rosales-Garcia all the process to which he was entitled by offering him annual parole reviews (on which occasions he could win release by demonstrating that he was neither a threat to flee nor a danger to public safety). *Id.* 7a. In January 2001, the Sixth Circuit reversed by a 2-1 vote. *Id.* 65a-139a. Although finding that the INS possessed authority to detain Rosales-Garcia indefinitely, the court determined that such indefinite detention violated his Fifth Amendment substantive due process rights. *Id.* 91a-111a. In December 2001, this Court granted the government's certiorari petition, vacated the Sixth Circuit's decision, and remanded the case to the Sixth Circuit for reconsideration in light of the Court's intervening decision in *Zadvydas*.

Carballo filed a habeas corpus petition in federal district court in Tennessee in December 1998, challenging both the statutory and constitutional authority for his continued detention. Noting that Carballo had filed (and lost) a very similar petition in 1990, the district court invoked law-of-the-case doctrine to deny the petition. *Id.* 195a-200a. In October 2001, a Sixth Circuit panel affirmed, holding that the petition was barred as a successive petition. *Id.* 140a-169a. In November 2001, the Sixth Circuit *sua sponte* issued an order vacating the October 2001 panel decision and directing that the case be heard *en banc*. *Id.* 201a-202a. Following this Court's remand of his case, Rosales-Garcia requested

that the Sixth Circuit hear his case *en banc* together with Carballo's; the Sixth Circuit granted that request. *Id.* 7a-8a.

In March 2003, a divided *en banc* court of appeals granted both habeas corpus petitions. *Id.* 1a-64a. The court determined that in both cases the government's detention authority derived from the current § 1231(a)(6), which was adopted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546.[2] The court determined that the limiting construction imposed on § 1231(a)(6) by *Zadvydas* should apply to Respondents' detention -- even though Respondents are inadmissible aliens apprehended at the U.S. border, while those subject to detention in *Zadvydas* were permanent resident aliens. Applying that limiting construction, the court held that under § 1231(a)(6) the government was not permitted to detain an inadmissible alien such as Respondents for more than six months following a final determination of inadmissibility, if there was no significant likelihood that the alien could be returned to his native country in the reasonably foreseeable future. *Id.* 28a-38a.

The court went on to articulate an alternative basis for its holding. It concluded that, quite apart from its interpretation of *Zadvydas*'s holding, "constitutional concerns would independently compel us to construe IIRIRA's post-removal-period detention provision to contain a reasonableness limitation for excludable aliens." *Id.* 38a. The court stated,

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[2] The government had argued that because Respondents' exclusion proceedings had been completed before 1996, their continued detention should be governed by the predecessor to § 1231(a)(6). However, the government's petition does not seek further review on this issue, and thus the issue is not now before the Court. *See* Pet. 19 n.4.

"Excludable aliens -- like all aliens -- are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* 40a. The court held that excludable aliens[3] are entitled to the same level of due process protection as are permanent resident aliens:

> If the Due Process Clause of the Fifth Amendment applies to Rosales and Carballo, as we believe that it must, we do not see how we could conclude that the indefinite and potentially permanent detention of Rosales and Carballo raises any less serious constitutional concerns than the indefinite and potentially permanent detention of the aliens in *Zadvydas*.

Id. 47a. While recognizing that indefinite detention of excludable aliens might be constitutionally permissible in cases raising national security concerns, the court held, "There are, however, no special circumstances involving national security in the instant cases." *Id.* 50a. The court ruled that substantive due process prohibited Respondents' continued detention based solely on predictions of future dangerousness. *Id.* 43a-45a. The court accordingly applied

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[3] Federal immigration law has not used the term "excludable" alien since the adoption of IIRIRA in 1996. Before 1996, Respondents were both deemed "excludable" -- *i.e.*, aliens who were apprehended at the border of the United States and denied entry. Under IIRIRA, such aliens are now deemed "inadmissible" -- a category that also includes aliens who have managed to enter the country without permission. *See* Pet 4-5 n.2. *Amici* nonetheless use the term "excludable" aliens herein, as a shorthand method of referring to inadmissible aliens who (like Respondents) were apprehended at the border of the United States and denied entry, and to distinguish such aliens from other classes of inadmissible aliens.

the doctrine of "constitutional avoidance" to construe § 1231(a)(6) as prohibiting Respondents' indefinite detention in the absence of evidence that they are likely to be returned to Cuba in the reasonably foreseeable future. *Id.* 52a-53a.

Judge Boggs, joined by Judges Krupansky and Batchelder, dissented. *Id.* 54a-64a. He argued that because "[t]he Supreme Court, in determining the scope of due process rights of aliens, has consistently distinguished between deportable and excludable aliens," it was unreasonable to construe *Zadvydas*'s interpretation of § 1231(a)(6) as applying to both categories of aliens. *Id.* 58a-59a. He argued that Respondents' constitutional claims were foreclosed by *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), a decision whose validity the Supreme Court in *Zadvydas* "specifically indicated that it was not questioning." *Id.* 59a.

REASONS FOR GRANTING THE PETITION

Amici fully support the arguments put forth by Petitioners George Snyder, Randy Davis, and the Bureau of Immigration and Customs Enforcement (hereinafter, "ICE"). Both the Sixth Circuit's constitutional analysis and its construction of 8 U.S.C. § 1231(a)(6) directly conflict with decisions of other federal appeals courts. Indeed, that conflict has grown more pronounced since the petition was filed.

Amici write separately in order to emphasize the tremendous public importance of the issues raised by this case. Criminal activity on the part of excludable aliens -- as well as other categories of inadmissible aliens -- is a serious public safety issue. Although ICE possesses statutory

authority to detain *all* inadmissible aliens following completion of the removal period, ICE (and its predecessor, INS) have chosen to limit such detention to those inadmissible aliens determined, following a hearing, to pose either a risk of flight or a threat to public safety. *See* 8 C.F.R. § 212.12 (detention of excludable/inadmissible Mariel Cubans); 8 C.F.R. § 241.4 (detention of other inadmissible aliens). Thus, the policy being challenged in this case affects *only* those individuals whose release is cause for grave concern. This case well illustrates that point. During his first two paroles, Respondent Rosales-Garcia managed to accumulate five felony convictions. Respondent Carballo has been on parole release for only two of the years since his attempted illegal entry into the United States, yet he managed to be arrested 16 times during those two years, and his felony convictions included one for attempted first degree murder. The Court should grant the petition to determine whether society ought to be permitted to place public safety concerns ahead of the liberty interests of inadmissible aliens who have been determined to pose a threat to public safety.

Amici also write separately in order to emphasize the national security concerns implicated by this case. The decision below leaves the federal government powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. The history of the Mariel Cubans illustrates that such "dumping" operations are more than a theoretical possibility. Moreover, the recent experience with Haiti indicates that attempted illegal entry by sea of massive numbers of foreigners is an ongoing problem and that detention of such foreigners until such time as they can be repatriated may be the only effective means of dealing with the problem.

Finally, the decision below is inconsistent with this Court's long history of distinguishing between the constitutional protections afforded to those who have lived in this country (and thus have some reasonable expectation of being permitted to remain) and the protection afforded to those apprehended at the border seeking initial entry into the country. In contrast to that history, the Sixth Circuit held that the liberty interests conferred on excludable aliens by the Fifth Amendment are identical to those conferred on citizens. The Court should grant review in order to resolve that conflict.

I. THE CONFLICT AMONG THE CIRCUITS HAS GROWN MORE PRONOUNCED SINCE THE PETITION WAS FILED

The Court should grant review because the decision below conflicts with the decisions of at least three other federal appellate courts, conflicts with the plain language of 8 U.S.C. § 1231(a)(6), and is neither compelled nor suggested by *Zadvydas*'s reading of that statute.

As the petition notes, the Sixth Circuit's decision is consistent with the views of the Ninth Circuit, which has held that § 1231(a)(6) prohibits detention of an inadmissible alien for more than six months following a final order of inadmissibility, if there is no significant likelihood that the alien can be repatriated in the reasonably foreseeable future. *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002). In contrast, the petition notes, the Fifth and Seventh Circuit have issued post-*Zadvydas* decisions that upheld indefinite detention of such aliens. *Rios v. INS,* 324 F.3d 296 (5th Cir. 2003); *Hoyte-Mesa v. Ashcroft,* 272 F.3d 989 (7th Cir. 2001). *Cf. Al Odah v. United States*, 321 F.3d 1134, 1140-

41 (D.C. Cir. 2003) (rejecting argument that the Fifth Amendment's Due Process Clause protects all aliens to the same extent that it protects citizens).

Rios and *Hoyte-Mesa* are arguable distinguishable in some respects from the decision below. The Sixth Circuit adopted alternative rationales for its decision: it held that Respondents' indefinite detention violated both § 1231(a)(6) and due process. *Hoyte-Mesa* held that detention of a similarly situated alien did not violate due process, but it did not decide the statutory issue. The Fifth Circuit held in *Rios* that *Zadvydas* did not overturn its prior holding in *Gisbert v. U.S. Atty. Gen.*, 988 F.2d 1437 (5th Cir.), *amended,* 997 F.2d 1122 (5th Cir. 1993), permitting indefinite detention of "excludable" aliens. *Rios,* 324 F.3d at 296. But the Fifth Circuit's one-page decision did not specify whether it was rejecting a statutory as well as a constitutional challenge to detention.

However, a recent decision from the Eighth Circuit is squarely in conflict with the decision below. Two weeks after this petition was filed, the Eighth Circuit rejected a Mariel Cuban's statutory and constitutional challenge to his indefinite detention by ICE. *Borrero v. Aljets,* 325 F.3d 1003 (8th Cir. 2003). The court stated, "Because the detention of inadmissible aliens does not raise the same constitutional concerns as does the detention of admitted aliens, we conclude that *Zadvydas*'s narrowing construction of § 1231(a)(6) does not limit the government's statutory authority to detain inadmissible aliens." *Id.* at 1005. The court explicitly disagreed with the statutory and constitutional analyses of the Ninth Circuit in *Lin Guo Xi v. INS* and the Sixth Circuit in the decision below. *Id.* at 1007.

After the Eighth Circuit's decision, there can be no dispute that the federal appeals courts are now irrevocably in conflict regarding the two issues decided by the Sixth Circuit. The conflict is fully mature and (in light of the government's assertion that well more than 1,100 excludable aliens under final orders of exclusion or removal are in detention and have been so for more than six months following issuance of such orders, Pet. 27-28) is urgently in need of resolution. In the absence of guidance from the Court, one can reasonably expect that the ICE will chose henceforth to house such detainees outside the states comprising the Sixth and Ninth Circuits. Given the importance of the issues involved, the power of the federal government to detain aliens deemed to pose a threat to public safety should not depend on the happenstance of where within the United States the aliens are located.

Amici share Petitioners' concern that Rosales-Garcia's release on parole renders his claims moot (despite the Sixth Circuit's ruling to the contrary) and that Carballo's claim may become moot if (as expected) he is paroled in September 2003. Pet. 29-30 n.8. *Amici* nonetheless urge the Court to grant the petition; the decision below constitutes too great a threat to public safety to be allowed to remain in place. *Amici* expect that the Mariel Cuban whose habeas corpus petition was denied in *Borrero* will file a petition for certiorari in the near future; if review is granted in all three cases, there is a reasonable chance that at least one of the cases will remain justiciable long enough for the Court to rule on the merits.

II. THIS CASE RAISES IMPORTANT PUBLIC SAFETY ISSUES THAT MERIT REVIEW

Respondents Rosales-Garcia and Carballo both have been convicted of serious felonies on multiple occasions. They do not contest that they have never been admitted into the United States and thus can claim no vested interest in living in this country. Nor do they dispute that they were provided ample opportunity to contest the factual finding that led to their detention: that they would pose a serious threat to public safety if allowed to live freely in this country. But given the current relationship between the United States and Cuba, immediate removal of Respondents and similarly situated excludable aliens is not a realistic prospect. Thus, either those adjudged to pose a danger to public safety must be detained by the ICE for the indefinite future until their removal can be arranged, or dangerous convicted felons must be released into American society.

The Sixth Circuit ruled that Congress, in adopting § 1231(a)(6), came down against detention of excludable alien felons whose removal cannot be effected (due to their native country's unwillingness to take them back) within six months of a final order of removal. Regardless whether that ruling is a proper reading of § 1231(a)(6), the ruling implicates important public safety issues that merit the Court's review.

As noted above, the ICE is detaining more than 1,100 excludable/inadmissible aliens whom it has been unable to remove from the country in a timely manner and who it has determined pose a threat to public safety. In virtually all such cases, those being detained are excludable aliens who (like Respondents) have abused earlier opportunities granted

to them: they have committed serious crimes after being released on parole. Those who oppose preventive detention of such excludable aliens assert that no one can be certain that those released into society will continue their lives of crime. Such assertions are demonstrably incorrect; it is a *statistical certainty* that a significant percentage of excludable alien felons who are subject to a final order of removal will, if released, commit additional crimes.

Study after study has demonstrated a pattern of continued criminal activity among released alien felons. For example, recent congressional hearings have focused on high recidivism among criminal aliens released by the INS. Former INS Commissioner Doris Meissner testified at a March 2000 hearing of the House Appropriations Subcommittee on Commerce, Justice, State and the Judiciary that between October 1994 and May 1999, the INS released 35,318 criminal aliens rather than detaining them pending deportation. Meissner testified that 11,605 of those released have gone on to commit "serious crimes," including at least 1,376 who committed "violent crimes." M. Hedges, "Criminal Aliens Often Released Instead of Deported," Scripps Howard News Service, March 9, 2000. Those 1,376 individuals committed a total of 1,845 violent crimes, including 98 homicides, 142 sexual assaults, 44 kidnappings, 346 robberies, and 1,214 assaults. *Id.*

It is telling that, despite their horrific criminal records and the resulting likelihood that they will once again endanger public safety, neither Rosales-Garcia nor Carballo is among those that the ICE is planning to continue to detain past September 2003. If neither Respondent is included among the 1,100 most dangerous excludable aliens who

cannot be repatriated in the near future, one can well imagine the extreme dangerousness of those who did make the cut.

The Sixth Circuit argued that substantive due process prohibits detention of individuals based solely on predictions of future dangerousness. Pet. App. 43a-45a. To support that proposition, the Sixth Circuit relied on a series of cases involving challenges to preventive detention of *citizens*. *See, e.g., United States v. Salerno,* 481 U.S. 739 (1987). But as this Court has repeatedly noted, "'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore v. Kim,* 123 S. Ct. 1708, 1716 (2003) (quoting *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976)). The Court has never held that citizens' due process protections against preventive detention should be extended on an equal basis to excludable aliens; to the contrary, it has routinely granted Congress and the Executive Branch broad discretion in the detention of such aliens. *See, e.g., Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953); *The Japanese Immigrant Case,* 189 U.S. 86 (1904). Review is warranted to determine whether the Sixth Circuit erred in ruling that an excludable alien's liberty interest in being free from detention while he awaits removal is sufficient to outweigh the public's right to be protected from the threats to safety posed by the release of those excludable aliens determined to be dangerous.

III. THIS CASE RAISES IMPORTANT NATIONAL SECURITY ISSUES THAT MERIT REVIEW

Rosales-Garcia and Carballo arrived at America's shores as part of a group of 125,000 Cubans who attempted to enter the country illegally by boat in the summer of 1980.

Once it became clear that Castro would not accept their return to Cuba, the federal government had three options short of admitting the Mariel Cubans as permanent residents: (1) it could turn the boats away and allow them to founder in the high seas; (2) it could detain the Cubans; or (3) it could parole them temporarily into American society until such time as their repatriation could be arranged. The first was not a realistic option in light of our humanitarian traditions. Thus, the United States chose a combination of the second and third options -- it paroled most of the Mariel Cubans pending repatriation, except that it detained (or canceled parole for) those small number of individuals who were determined to pose a threat to public safety.

The Sixth Circuit's decision *requires* the federal government to adopt the third option as a matter of constitutional law. That decision raises serious national security concerns. It leaves the federal government powerless to prevent a foreign country from dumping all of its undesirable citizens (or a total number of citizens in excess of our capacity to absorb them into our society) and then refusing to take them back. Indeed, the evidence is clear that the Cuban government engaged in just such a "dumping" operation in 1980 in connection with the Mariel Cubans. The Court has made clear that the federal government is entitled to control immigration as a means of protecting national security and thereby ensuring that there is "'no unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)). Review is warranted to consider the important national security concerns raised by the Sixth Circuit's refusal to permit the federal government to take steps to prevent recurrence of mass migrations such as the Mariel boatlift.

A recent adjudicative decision by Attorney General John Ashcroft well illustrates these national security concerns. *See In re D__J__*, 23 I&N Dec. 572 (A.G., Apr. 17, 2003). In the past two years, thousands of Haitians have attempted to enter the United States by boat. One boat containing 216 undocumented Haitians and Dominicans sailed into Biscayne Bay, Florida on October 29, 2002. Although many of the arrivals sought to flee, most were taken into custody by the INS. Virtually all of the arrivals, including "DJ," applied for asylum and sought release on parole while their asylum claims were pending. The INS did not introduce evidence that any of the arrivals posed a threat to public safety. The Attorney General nonetheless ruled that DJ and similarly situated excludable aliens should be detained (pending review of their asylum claims) based on national security concerns. *In re D__J__*, 23 I&N Dec. at 579-81. The Attorney General explained:

> [R]eleasing respondent [DJ], or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and sound immigration policy. As demonstrated by the declarations of the concerned national security agencies submitted by INS, there is a substantial prospect that the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges of illegal migration by sea. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. As substantiated by the government declarations, surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and homeland security responsibilities.

Id. at 579.

The Attorney General further concluded that releasing such excludable aliens on parole raised national security concerns because, in mass immigrant situations, it is difficult to do sufficient background checks to ensure that terrorists are not among those seeking to enter illegally. *Id.* at 580. He noted that the State Department "has observed an increase in aliens from countries such as Pakistan using Haiti as a staging point for migration to the United States." *Id.*

Numerous courts have recognized that national security concerns are a legitimate basis for detaining excludable aliens pending their repatriation. For example, in upholding the INS's authority to detain excludable aliens who had arrived by boat from Haiti, the Eleventh Circuit observed:

> [T]he Supreme Court has long recognized that the exclusion process is intimately related to considerations of both national security and foreign policy. *See, e.g., Harisiades* [*v. Shaugnessy*], 342 U.S. [580,] 588-89 [(1952)] ("Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . ."); *The Chinese Exclusion Case,* 130 U.S. [581,] 606 [(1889)] (noting that threats to national security can come both "from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us").

Jean v. Nelson, 727 F.2d 957, 977 n.28 (11th Cir. 1984).

Amici recognize that *Jean* and *In re D__J___* both involved excludable aliens who were being detained while

their exclusion/removal proceedings were ongoing. The INS did not suggest in either case that Haiti would be unwilling to accept the return of its citizens should their asylum claims be denied. In contrast, Respondents Rosales-Garcia and Carballo have had final orders of exclusion entered against them and (at least at the time they filed their habeas corpus petitions) were facing the prospect of indefinite detention. Nonetheless, the national security concerns that animated *Jean* and *In re D__J__* are equally present in this case. Unless the ICE retains the option of detaining excludable aliens who come to our shores from countries (such as Cuba) that are unwilling to accept their citizens back, there is a serious danger that we will be overwhelmed by increasing numbers of such aliens seeking to enter the United States illegally. Under the Sixth Circuit's decision, those contemplating illegal entry from such countries will be encouraged to do so because they can rest assured that they will be permitted to live indefinitely in the United States, regardless whether they qualify for refugee status and regardless whether they pose a threat to public safety. Review is warranted to determine whether Congress really intended to leave such a massive unprotected spot in the nation's armor.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

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